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No. _____

IN THE

Supreme Court of the United States

October Term, 1984

MINNESOTA ASSOCIATION OF HEALTH CARE FACILITIES, INC., et al.,

Petitioners,

vs.

MINNESOTA DEPARTMENT OF PUBLIC WELFARE, et al.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Question No. 1

Under the Fourteenth Amendment to the United States Constitution may the State of Minnesota require, as a condition of participation in the Medicaid program, that private proprietary and non-proprietary nursing homes charge non-Medicaid (private) residents the same rate for nursing home care as the State pays for Medicaid residents, where the State may and does set the Medicaid rate for many nursing homes at a level which does not permit nursing homes to recover their actual operating costs?

Question No. 2

Does the fact that private proprietary and non-proprietary nursing homes may not be legally required to participate in the Medicaid program deprive them of their rights to challenge and have declared unconstitutional a statutory requirement

requiring nursing homes to equalize rates charged to Medicaid and non-Medicaid (private) residents?

PARTIES TO THE PROCEEDINGS BELOW

Parties to the proceedings below subject to this petition for writ of certiorari include the Minnesota Association of Health Care Facilities, Inc.; Sunshine Villa, Inc.; Augustana Lutheran Homes, Inc.; Red Wing Nursing Home of TLC Nursing Centers, Inc.; Mala Strana Nursing Home of New Prague; Excelsior Nursing Home of Iroquois-Excelsior, Inc.; and Valleyview Nursing Home, Inc. The above-named nursing home association and nursing homes were all original plaintiffs in this case, with the exception of Excelsior Nursing Home of Iroquois-Excelsior, Inc., and Valleyview Nursing Home, which were intervenors. The Minnesota Department of Public Welfare (now known as the Minnesota Department of Human Services) and Leonard W. Levine, Commissioner of Public Welfare, were original defendants in this

litigation, with the Nursing Home Residents' Advisory Council intervening on behalf of the defendants.

This case was consolidated for trial with another case entitled Minnesota Hospital Association, et al. v. Minnesota Department of Public Welfare, United States Court of Appeals for the Eighth Circuit Docket No. 83-2447-MN. The issue involved in that consolidated case, however, is not at issue through this petition for writ of certiorari, and the parties to that proceeding are therefore not involved.

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Petitioners, Minnesota Association of Health Care Facilities, Inc., Sunshine Villa, Inc., Augustana Lutheran Homes, Inc., Red Wing Nursing Home of TLC Nursing Centers, Inc., Mala Strana Nursing Home of

New Prague, Excelsior Nursing Home of Iroquois-Excelsior, Inc., and Valleyview Nursing Home, Inc. respectfully pray that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on August 28, 1984, rehearing denied on October 1, 1984.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, rendered on August 28, 1984, rehearing denied on October 1, 1984, for which review is herein sought, is reported in Minnesota Association of Health Care Facilities, Inc. v. Minnesota Department of Public Welfare, 742 F.2d 442 (8th Cir. 1984)(Appendix B). The judgment of the United States District Court for the District of Minnesota that was appealed to the Eighth Circuit is not reported and is included as Appendix C. The Findings of

Fact and Conclusions of Law and the Memorandum of the Magistrate, before whom trial was held by consent, are also not reported and are included in Appendices G and H.

JURISDICTION

Petitioners seek the review of the order issued by the Eighth Circuit Court of Appeals and entered on August 28, 1984. The order denying Appellants' Petition for Rehearing was issued on October 1, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254, as a review by writ of certiorari of a civil case in the Eighth Circuit Court of Appeals. The United States Court of Appeals for the Eighth Circuit has interpreted a Minnesota statute in a manner which is repugnant to the United States Constitution.

TEXT OF CONSTITUTIONAL AND STATUTORY PROVISIONS

The following are the relevant constitutional and statutory provisions applicable to this appeal, stated verbatim as required by Supreme Court Rule 21.1(f):

United States Constitution, Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV, Section One

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Minn. Stat. § 256B.48, subd. 1(a)(1977) (the Equalization Statute).

> No nursing home shall be eligible to receive medical assistance payments unless it agrees in writing that it will refrain from:
>
> > (a) Charging nonmedical assistance residents rates for similar services which exceed by more than ten percent those rates which are approved by the state agency for medical assistance recipents. For nursing homes charging nonmedical assistance residents rates less than ten percent more than those rates which are approved by the state agency for medical assistance recipents, the maximum different in rates between nonmedical assistance residents and medical assistance recipents shall not exceed that different which was in effect on April 13, 1976. If a nursing home has exceeded this different since April 13, 1976, it shall return the amount collected in excess of the allowable different stated by this subdivision to the nonmedical assistance resident, or that person's representative, by July 1, 1977. Effective July 1, 1978, no nursing home shall be eligible for medical assistance if it charges nonmedical assistance recipents rates for similar services which exceed those which are approved by the state agency for

medical assistance recipients; provided, however, that the nursing home may (1) charge nonmedical assistance residents a higher rate for a private room, and (2) charge for special services which are not included in the daily rate if medical assistance patients are charged separately at the same rate for the same services in addition to the daily rate paid by the state agency.

STATEMENT OF THE CASE

A. Introduction.

This complex and lengthy litigation raises a challenge to the validity of a Minnesota statute, Minn. Stat. § 256B.48, subd. 1(a), hereinafter referred to as the "Equalization Statute," which permits the State of Minnesota to establish rates charged by private proprietary and non-proprietary nursing homes to residents, whether or not such residents are having their costs of care paid for by the State under the Medicaid (known in Minnesota as the Medical Assistance) program established under Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396p. By

virtue of the Equalization Statute, the State of Minnesota sets the Medicaid rate for all nursing homes participating in the Medicaid program, and nursing homes must thereafter establish a rate for their non-Medicaid residents equaling the Medicaid rate, no matter how arbitrarily set, in order to receive Medicaid funds.

The Equalization Statute is unique. No state other than Minnesota has a similar statute. The practical impact of the Equalization Statute is to permit a volume purchaser of nursing services, the State of Minnesota, to take a non-negotiated discount by virtue of its own ability to set Medicaid rates, and to force nursing homes to pass the same discount on to all other purchasers of nursing home services as well, whether or not such purchasers would otherwise be entitled to a discount. This system ignores the fact that there may be significant cost differences in the

ability of any given nursing home to provide nursing care services to a block of Medicaid residents as opposed to individual, non-Medicaid residents. For example, nursing homes may have to bear costs of advertising for and absorbing bad debts of non-Medicaid residents. Non-Medicaid residents must be billed individually and not on a single invoice as are Medicaid residents. Whatever efficiencies that may exist to keep costs lower for Medicaid residents simply may not apply to non-Medicaid residents.

The Equalization Statute was originally passed in 1976, making nursing homes ineligible to receive Medicaid payments unless they agreed, in writing, to refrain from:

> Charging nonmedical assistance residents rates for similar services which exceed by more than ten percent those rates which are approved by the state agency for medical assistance recipents. Effective July 1, 1978, no nursing home shall be eligible for medical assistance if it charges nonmedical assistance

> recipents rates for similar services which exceed those which are approved by the state agency for medical assistance recipents; provided, however, that the nursing home may (1) charge nonmedical assistance residents a higher rate for a private room, and (2) charge for special services which are not included in the daily rate if medical assistance patients are charged separately at the same rate for the same services in addition to the daily rate paid by the state agency.

Minn. Stat. § 256B.48, subd. 1(a)(1976). This statute was amended in 1977 by retroactively reducing the ten percent differential to "that differential which was in effect on April 13, 1976, if that differential was less than ten percent."[1]

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[1]Minn. Stat. § 256B.48, subd. 1(a), was further amended by Minn. Laws 1983, ch. 199, § 14, and now reads, in relevant part, as follows:

> A nursing home is not eligible to receive medical assistance payments unless it refrains from:
>
> (a) Charging private paying residents rates for similar services which exceed those which are approved by the state agency for

In October 1977, the Minnesota Association of Health Care Facilities, Inc.

> medical assistance recipents as determined by the prospective desk audit rate, except under the following circumstances: the nursing home may (1) charge private paying residents a higher rate for a private room, and (2) charge for special services which are not included in the daily rate if medical assistance residents are charged separately at the same rate for the same services in addition to the daily rate paid by the commissioner [of Human Services]. A nursing home that charges a private paying resident a rate in violation of this clause is subject to an action by the state of Minnesota or any of its subdivisions or agencies for civil damages. A private paying resident or the resident's legal representative has a cause of action for civil damages against the nursing home that charges the resident rates in violation of this clause. The damages awarded shall include three times the payments that result from the violation, together with costs and disbursements, including reasonable attorneys' fees or their equivalent.

(hereinafter referred to as "MAHCF"), and individual nursing homes, initiated this litigation challenging (1) the validity of the Equalization Statute, (2) the 1977 retroactive amendment to that statute, and (3) whether or not Minnesota's Medicaid reimbursement formula for nursing homes complied with federal law. After several preliminary motions and a lengthy trial, United States Magistrate Brian P. Short issued Findings of Fact and Conclusions of Law, Memorandum, and an Order for Judgment on April 26, 1983 (Appendices F-H), finding against the plaintiffs (Petitioners herein) on all issues.

Petitioners appealed Magistrate Short's decision to the Honorable Edward J. Devitt, Judge of the Minnesota District Court, who, on September 13, 1983, affirmed Magistrate Short's Order on the issue of the validity of the Equalization Statute and the retroactive portion

thereof (Appendices C and D).[2] Because Judge Devitt entered no separate findings, conclusions, or memorandum, Petitioners assumed that he adopted the Magistrate's findings and conclusions as his own.

Petitioners then further appealed the issues of the validity of the Equalization Statute and the 1977 retroactive portion of that statute to the United States Court of Appeals for the Eighth Circuit. That Court ruled that the retroactive amendment to the Equalization Statute was unconstitutional. However, the Eighth Circuit upheld the constitutionality of the Equalization Statute except for its retroactive feature. Minnesota Association of Health Care Facilities, Inc. v. Minnesota

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[2]On appeal were only the issues of the Equalization Statute and the retroactive application of the Equalization Statute. The judgment concerning the validity of Minnesota's Medicaid reimbursement system under federal law was not pursued beyond Magistrate Short.

Department of Public Welfare, 742 F.2d 442 (8th Cir. 1984), also set forth in Appendix B. Specifically, the Eighth Circuit held "unconstitutional the part of the statute which retroactively requires refund of collected charges, but reject[ed] the remaining constitutional challenges." 742 F.2d at 444.

This petition for a writ of certiorari seeks a review of the Eighth Circuit's determination as to the constitutionality of the Equalization Statute. No other issues remain.

The decision of the United States Court of Appeals for the Eighth Circuit upholding the validity of the Equalization Statute rests primarily upon two grounds. First, the Eighth Circuit places great weight on its conclusion that participation in the Medicaid program, subjecting a nursing home to the Equalization Statute, is voluntary and, as such, "[t]his

voluntariness forecloses the possibility that the [equalization] statute could result in an imposed taking of private property which would give rise to the constitutional right of just compensation . . . ." 742 F.2d at 446. Second, the Eighth Circuit goes on to determine that under the facts of this case there are no violations of the due process, equal protection, and impairment of contracts provisions in the Fourteenth Amendment to the United States Constitution.

As will be developed herein, the Medicaid program in Minnesota for nursing homes is, de facto, not voluntary. The requirement of equalizing Medicaid and non-Medicaid resident nursing care rates does infringe on basic constitutional rights of private proprietary and non-proprietary nursing homes to the extent that the Equalization Statute should be declared unconstitutional.

B. Statement of Facts.

In 1980, there were 440 nursing homes in Minnesota. The vast majority of those nursing homes, 438 in 1980, participated in the Medicaid program. Magistrate's Findings of Fact I.B.3. (Appendix G-4), and I.B.10. (Appendix G-5). Between sixty and sixty-five percent of the residents in these nursing homes were on Medicaid. Magistrate's Finding of Fact I.B.13. (Appendix G-5).

The Medicaid Act, Title XIX of the Social Security Act, establishes a cooperatively funded and administered program between the state and federal government for the purpose of enabling states to furnish Medicaid to and on behalf of aged, blind, or disabled individuals whose income and resources are insufficient to meet the costs of necessary medical services. 42 U.S.C. §§ 1396-1396p. Pursuant to statutory

formula, the federal and state overnments share the costs of such aid. In Minnesota, the Department of Public Welfare (now known as the Department of Human Services) administers the program. Magistrate's Finding of Fact I.B.4. (Appendix G-4).

The rate that the State of Minnesota will pay for the care of Medicaid recipients is established by the Minnesota Department of Public Welfare presumably in a manner consistent with relevant state statutes and rules. See Minn. Rules, ch. 9510 (1983), recodifying and replacing 12 MCAR § 2.049. The Department of Public Welfare can and does change its Medicaid reimbursement rules for nursing homes from time to time. In the last analysis, nursing homes have no control over how the State of Minnesota and the Department of Public Welfare will establish nursing home per diem Medicaid reimbursement rates. At

best, such nursing homes can participate only as any other person in providing testimony at public hearings on provisions of rate making rules. Minn. Stat., ch. 14 (1983). The present Medicaid reimbursement rules for nursing homes did not even have to go through a public hearing process. Minn. Stat. § 256B.502 (1983), Minn. Rules ch. 9510 (1983).

Under the Equalization Statute, a nursing home[3] is required to take the Medicaid rate and to equalize rates charged to non-Medicaid residents to it. No specific considerations are taken into account for different factors that might make an

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[3]As originally enacted, the Equalization Statute applied only to licensed nursing homes in the State of Minnesota. Under changes contained in Minn. Laws 1983, ch. 199, effective July 1, 1983, nursing homes were redefined to include licensed boarding care facilities for purposes of application of the Equalization Statute. See Minn. Stat. § 256B.421, subd. 7 (1983).

impact on charges to private paying residents except as spelled out in the Equalization Statute itself.

The methodology utilized by the Department of Public Welfare in determining Medicaid rates for residents in nursing homes was found by Magistrate Short to comply with the requirements of federal law. Magistrate's Conclusion of Law No. 4 (Appendix G-24). However, compliance with the federal law does not mean that all Minnesota nursing homes were permitted to recover, under the Medicaid formula, all actual costs of operation. In fact, such was not the case. At trial, evidence was presented that shows that the Medicaid rate did not reimburse efficiently operated nursing homes for their actual and reasonable costs. A study prepared by the Minnesota Systems Research, Inc. (MSRI), showed the average nursing home in the state to have costs $401.62 greater

than reimbursed by the Medicaid rate. MSRI Study Table 1, plaintiff Exhibit 19; Magistrate's Memorandum (Appendix H-29).

Richard Kahan, a health economist well recognized in his field, testified as to conclusions he made based on the MSRI Study, his experience, and his training. Mr. Kahan concluded that the MSRI Study showed total costs per facility books were $13,956.36 higher on the average than those costs allowed by the Department of Public Welfare in calculating a nursing home's Medicaid rate. Testimony of Kahan, pp. 55-57. Mr. Kahan was unequivocable in his testimony that the Minnesota reimbursement system did not establish a rate that reimbursed economically and efficiently operated facilities their actual, reasonable costs. Testimony of Kahan, pp. 59-61.

While the legitimacy of the rate setting standards under Medicaid are no

longer at issue as such herein, the important point that must be made is that individual nursing homes have no control over how their Medicaid rates are determined, no matter what standards are used. To the extent that the State of Minnesota can at any time arbitrarily establish a nursing home's Medicaid rate, based on budgetary considerations or otherwise, there is a continuing and real danger that nursing homes may not be able to recover their costs of operation, much less a profit, if they must equalize their non-Medicaid (private) rates to their Medicaid rates.

Testimony and other evidence presented at trial show the very real dangers of an inadequate Medicaid rate to which nursing homes must equalize their private rates. Even when Medicaid rates are adequate, the ability of the State of Minnesota unilaterally to change the Medicaid

reimbursement system at any time it wishes, affecting both Medicaid and non-Medicaid residents, makes the Equalization Statute inherently unconstitutional.

ARGUMENT

Despite the complexity of the issues raised and the voluminous record developed below, the Appendix before the Court is fairly limited. However, the importance of this case should not be underestimated. The legal precedent established in this case, if it is upheld, gives states far-reaching authority to regulate in areas never before contemplated. If a state has the power to establish rates that may be charged to private residents of nursing homes, it logically would have the authority to set, without limitation, any rate that may be charged by any vendor of any goods or services, irrespective of how that rate

setting authority might affect the very ability of that vendor to survive economicly. In the health care area, such authority could logically be exercised in controlling rates charged to private persons by doctors, hospitals, dentists, and any other health care provider.

No other state has enacted a statute similar to Minnesota's Equalization Statute. In effect, what has occurred in Minnesota is that the State, as a volume purchaser of Medicaid services, is able to command not only a discount for itself in making payment for the care of Medicaid residents, but a discount for all other users of nursing home services. Unlike any other volume discount purchaser situation, the buyer is dictating the price paid by all other purchasers of nursing home care services. While situations abound where the federal government and large volume purchasers may

by virtue of sheer size be able legally to command a certain price for goods or services, Petitioners are unaware of any other situation where that buyer can compel the same price for all other purchasers of the service, particularly where the price is unilaterally set by the purchaser with no meaningful negotiation occurring with the seller. As Magistrate Short recognized, even though finding against the Petitioners, "the providers who testified were indeed impressive witnesses. Their story is one of small business struggling in a heavily regulated industry." Magistrate's Memorandum (Appendix H-29). The possibility of survival for small business nursing home providers under these circumstances is tenuous at best, without giving the state total control over revenues of the providers.

It is difficult to argue adequately all

of the relevant legal authority impacting upon the questions raised in this case through this petition for a Writ of Certiorari. Petitioners below will attempt to show the Court sufficient authority to grant this Petition and to permit further briefing and argument herein.

A. The Minnesota Equalization Statute Must Be Declared Unconstitutional under the Fourteenth Amendment to the United States Constitution.

The United States Court of Appeals for the Eighth Circuit, citing Nebbia v. New York, 291 U.S. 502 (1934), held that the State of Minnesota was not violating Petitioners' constitutional rights through passage and enforcement of the Equalization Statute. Minnesota Association of Health Care Facilities, Inc. v. Minnesota Department of Welfare, 742 F.2d 442, 447 (8th Cir. 1984). However, the Eighth

Circuit ignored substantial factual differences between the situation in Nebbia and traditional due process cases, as compared with the fact situation in the State of Minnesota as a result of the passage of the Equalization Statute.

Petitioners herein are not taking the position that under no conditions could the State of Minnesota regulate nursing home rates. What Petitioners are saying, however, is that the State of Minnesota cannot arbitrarily create formulas for determining Medical Assistance nursing home care rates and then apply those rates to non-Medicaid residents. What Minnesota is doing is a far cry from the type of state regulation previously upheld by this Court.

As recognized by the Eighth Circuit, in order to withstand substantive due process requirements, laws must have a reasonable relationship to a proper legislative

purpose and must be neither arbitrary nor discriminatory. 742 F.2d at 447. In this case, however, the Equalization Statute is arbitrary, and discriminates against nursing homes participating in the Medicaid program.

As noted by this Court in Nebbia:

> And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained It results that a regulation valid for one sort of business, or in given circumstance, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts. [Emphasis supplied].

291 U.S. at 525.

While the Eighth Circuit correctly cited the principles of law involved in the Nebbia case, it failed to take into account the significant factual differences from the instant case. For example:

(1) In Nebbia, the state was not a purchaser at all, but was attempting to regulate the price of milk for the benefit of the producers, distributors, and consumers alike. Here the primary beneficiary of the state's Medicaid rate setting is the state itself because Medicaid rates are set in a large part according to the state's economic condition. It is arbitrary to tie non-Medicaid rates to the state's economic condition.

(2) In Nebbia, a purpose of the legislation involved was to bolster profitability. Specifically, the New York statute was designed to prevent reducing farm income below costs. Id. at 530. Prices were set artifically high and, unlike Minnesota, were not artifically limited.

(3) In Nebbia, the legislation setting prices of milk was of a very short-term

nature. Here the Equalization Statute is permanent and can be administered at the whim of the state. The state can limit the non-Medicaid rates through the manipulation of the Medicaid rate any time it so chooses.

(4) The evidence herein indicates that nursing homes, on the average, are being paid less than their costs of providing nursing home care. Clearly, such was not the situation in Nebbia where, in fact, prices were being inflated artifically high to prevent the reducing of farm income below costs.

(5) In Nebbia, the producer and distributor of milk shared the risk of the New York law. Id. at 519. In the instant situation, all of the risk is on the nursing homes under the Equalization Statute.

(6) In Nebbia, the legislation mandated

a "reasonable return" to the producer and the dealer. Id. at 519-20 n.2. There are no protections under the Equalization Statute to assure that nursing homes may obtain a reasonable or adequate return, or even recover the costs of their operation.

A number of cases, particularly in the public utility area, have recognized that when the government becomes involved in rate making, the rates must be sufficient to yield a reasonable return on the value of the property being used. See, for example, Bluefield Waterworks and Improvement Co. v. Public Service Commission, 262 U.S. 679, 690 (1923). The Eighth Circuit stated that public utility cases are inapposite because the instant case does not involve a forced taking of property. 742 F.2d at 446. However, this determination by the Eighth Circuit is based on the theory that nursing homes

voluntarily participate in the Medicaid program and can withdraw at will and without financial loss, an assumption which is discredited infra. The Equalization Statute regulates both Medicaid and private pay rates in a way that deprives or potentially deprives nursing homes of the opportunity to obtain a reasonable rate of return either through the generation of income from the sale of nursing home services or the sale of nursing homes themselves. Even the state's own expert witness in this protracted litigation, L. William Katz, admitted upon cross examination that Minnesota nursing homes were not a good investment for a number of reasons, including the comparative risk of investment arising out of the close government regulation of the industry and the relatively low return compared to other investment opportunities. Testimony of Katz, 105-107,

111-112.

In addition to depriving Petitioners of due process of law, the Equalization Statute violates the equal protection clause of the United States Constitution. That clause forbids treating similarly situated classes of persons in an unlike manner. Yick Wo v. Hopkins, 118 U.S. 356 (1886).

The Equalization Statute is applied only to Minnesota nursing homes that participate in the Medicaid program. But nursing homes that participate in the Medicaid program are not only similarly situated, but are identically situated to those few nursing homes that do not participate in the Medicaid program, with the sole exception of their participation. Yet, non-participating nursing homes are free to set their private pay rates at any level they desire. Both participating and non-participating nursing homes provide

health care services on a continuing basis, both provide identical levels of care, both have to meet identical state requirements for licensure, and both have the same demands on occupancy.

In addition to the example of discrimination as between nursing homes participating in the Medicaid program and those not participating in Medicaid, there has also been a failure in previous opinions rendered herein to differentiate between nursing homes and other types of long term care providers such as boarding care facilities and facilities for the mentally retarded. The Eighth Circuit concluded that the Minnesota Legislature could rationally have believed that the problems arising from rate discrepancies were most serious in nursing homes that were participating in Medicaid, but that court offers no citation to any portion of the record that would support this

assertion. 742 F.2d at 448 (Appendix B-10).

The evidence shows that boarding care homes are identical to participating nursing homes in all respects possibly relevant to the offered legitimate legislative purposes of the Equalization Statute. Boarding care homes certified for Medicaid have their Medicaid resident rate determined under the same reimbursement rules as nursing homes. Boarding care homes are subject to licensure under virtually identical physical plant standards as are nursing homes. Both types of facilities provide long term care and differ basically only in staffing patterns. Compare Minn. Stat. § 144A.10 with Minn. Stat. § 144.653. See also rules governing these nursing homes and boarding care homes codified at Minn. Rules, chapter 4655. Yet, boarding care facilities were not brought under the

Equalization Statute until 1983 when the legal definition of nursing homes was expanded to include them. Minn. Stat. § 256B.421, subd. 7 (1983). Non-Medicaid certified boarding care facilities and other similar long-term care facilities are still not subject to limitations in rates charged to private residents.

The Equalization Statute, as developed by the evidence herein, also substantially impairs existing contracts entered into by nursing homes with nursing home residents and with the State of Minnesota. Arguments raised by Petitioners herein compel this conclusion under the relatively recent cases of Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978), and United States Trust Co. v. New Jersey, 431 U.S. 1 (1977).

Many cases, particularly in the area of antitrust law, have dealt with the issue as to whether or not a volume purchaser

can control prices charged to it. See, for example, the very recent case of Kartell v. Blue Shield of Massachusetts, Inc., No. 84-1241 (1st Cir., Nov. 28, 1984). In that case, medical doctors in the state of Massachusetts were challenging billing practices of Massachusetts Blue Shield wherein Blue Shield was able to command set fees for services rendered by doctors to its subscribers, while prohibiting doctors from making any additional billings to the subscribers for those same services. In overruling the District Court and in permitting the Blue Shield practice, the First Circuit stated:

> Participating in Blue Shield's program does not stop doctors from taking other patients or from charging those other patients what they like. As long as Blue Shield's rates are even marginally remunerative, ninety-nine percent of all doctors might sign up with Blue Shield if it had only ten policy holders or ten thousand instead of several million.

Id. at 14.

Minnesota nursing homes, by the same token, could live with the state's setting rates for Medicaid residents if these nursing homes had, as did the Massachusetts' doctors, the same rights to establish rates for non-Medicaid residents. Such rates would still be limited by competition in the market place.

B. Participation in the Medicaid Program is, de facto, not Voluntary for Minnesota Nursing Homes.

Courts below have noted that one reason for not granting Petitioners the relief they are seeking herein is that participation in the Medicaid program is voluntary. In fact, participation is not voluntary. Even if participation somehow can be considered voluntary, Petitioners cannot be compelled to waive basic constitutional rights by participating in the Medicaid

program.

When the Equalization Statute became effective, 438 out of 440 nursing homes in the state of Minnesota participated in the Medicaid program. Magistrate's Finding of Fact I.B.3. (Appendix G-4), and I.B.10. (Appendix G-5). In Minnesota nursing homes, between sixty and sixty-five percent of the residents were on Medicaid. Magistrate's Finding of Fact I.B.13. (Appendix G-5). Given the facts that nursing homes had already been built and had historically supplied a majority of their beds to Medicaid residents at the time of passage of the Equalization Statute, voluntary withdrawal from the Medicaid program was virtually impossible for any given nursing home. Logically, as a group, nursing homes could not replace Medicaid residents with non-Medicaid residents given the high percentage of nursing home Medicaid resi-

dents in the state. It is difficult to perceive how it can be construed that nursing homes voluntarily participate in the Medicaid program. Clearly, given the economics of the situation, if other sources of residents were readily available nursing homes would not remain in the Medicaid program. Given the reality of large existing capital expenditures in nursing homes and the high percentage of residents on Medicaid, however, nursing homes have no real choice except to remain in the Medicaid program, even if it means sustaining losses through enforced equalization of Medicaid and non-Medicaid nursing home service rates. Only the State's method of setting nursing home resident Medicaid payment rates at any given time will determine whether or not these nursing homes can survive if the validity of the Equalization Statute is upheld.

Even Magistrate Short, though concluding that the program was voluntary, recognized the de facto involuntariness of participation in the Medicaid program for nursing homes by stating: "Thus, in order to stay in business, plaintiffs must be able to accept Medicaid patients." Magistrate's Memorandum (Appendix H-9). In spite of this, Magistrate Short somehow concludes that if Petitioners find the reimbursement rates to be insufficient they can make their homes more efficient and economic (without noting that any efficiencies are limited by minimum standards which all nursing homes must meet as a condition of licensure) or terminate their relationship with Medicaid. Magistrate's Memorandum (Appendix H-10). This legal conclusion really does not make any sense once it is determined that nursing homes, as a group, do not voluntarily have the ability to

move at will into and out of the Medicaid program.

As a practical matter, Minnesota nursing homes are totally interwoven into the Medicaid program. They committed to participation in the Medicaid program long before passage of the Equalization Statute and are now the victims of a major change of the rules of the ballgame well after the game has begun. Further, where nursing homes have attempted to withdraw from Medicaid, they have been faced with challenges by Medicaid residents on the attempted withdrawal. See, e.g., Fuzie v. Manor Care, Inc., 461 F.Supp. 698 (N.D. Ohio 1977).

The proposition that one may be required to forgo constitutional rights in order to receive government benefits has been solemnly rejected by this Court itself. In the recent case of Western and Southern Life Insurance Co. v. State Board

of Equalization, 451 U.S. 648, 664-65 (1981), the Court, citing Frost and Frost Trucking Co. v. Railroad Commission, 271 U.S. 583, 593-94 (1926), stated:

> It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties imbedded in the Constitution of the United States may thus be manipulated out of existence. [Emphasis supplied.]

Western and Southern Life Insurance Co. questioned the power of the State of California to tax foreign insurance companies doing business in the state. The Court found that California could impose only those conditions on the out-of-state insurer that were consistent

with the Constitution. The same criterion should apply to the State of Minnesota herein. See also Power Manufacturing Co. v. Saunders, 274 U.S. 490 (1927); Hanover Fire Insurance Co. v. Harding, 272 U.S. 494 (1926); and W. W. Cargill Co. v. Minnesota, 180 U.S. 452 (1901).

The recent decision of this Court in National Collegiate Athletic Association v. Board of Regents, ___ U.S. ___, 52 U.S.L.W. 4928 (1984), reinforces this concept that voluntary participation does not deprive an entity of rights which it might otherwise have. Therein two universities, even though voluntarily belonging to the National Collegiate Athletic Association (NCAA), did not waive rights to challenge policies of that association by voluntarily belonging to the association. The United States Court of Appeals for the Tenth Circuit rejected the argument that universities voluntarily

joining the NCAA were not deprived of standing to challenge policies of that association, a determination not disturbed by this Court on appeal. See Board of Regents v. National Collegiate Athletic Association, 707 F.2d 1147 (10th Cir. 1983). If universities can retain standing to challenge policies of an association voluntarily joined, certainly nursing homes cannot be deprived of constitutional rights by voluntarily participating in the Medicaid program. Constitutional rights clearly are more basic and deserving of judicial protection than rights of standing.

If nursing homes are not entitled to exercise their constitutional rights in regard to the Equalization Statute, then the voluntariness argument could be extended to any person or any entity participating in any type of state or federal program at any time. Such simply

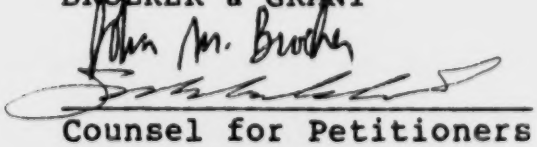
is not and must not be the law. A nursing home's voluntary or involuntary participation in the Medicaid program makes no difference in determining whether or not a nursing home's constitutional rights have been violated.

CONCLUSION

On the basis of the foregoing arguments and authorities, Petitioners respectfully petition this Court for writ of certiorari to review the questions presented herein. If private businesses are to continue to receive basic constitutional protections, statutes such as Minnesota's Equalization Statute must be carefully scrutinized and, as here, be declared unconstitutional.

Respectfully submitted this 31st day of December, 1984.

BROEKER & GRANT



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